

CLERK US BANKRUPTCY COURT
DISTRICT OF OREGON

'05 AUG 30 P3:03

LOGGED _____ RECD _____

PAID _____ DOCKETED _____

Albert N. Kennedy, OSB No. 82142

Direct Dial: (503) 802-2013

Facsimile: (503) 972-3713

E-Mail: al@tonkon.com

Timothy J. Conway, OSB No. 85175

Direct Dial: (503) 802-2027

Facsimile: (503) 972-3727

E-Mail: tim@tonkon.com

Michael W. Fletcher, OSB No. 01044

Direct Dial: (503) 802-2169

Facsimile: (503) 972-3869

E-Mail: michaelw@tonkon.com

TONKON TORP LLP

1600 Pioneer Tower

888 S.W. Fifth Avenue

Portland, OR 97204

Attorneys for Tort Claimants Committee

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In re

ROMAN CATHOLIC ARCHBISHOP OF
PORTLAND IN OREGON, AND SUCCESSORS, A
CORPORATION SOLE, DBA THE ARCHDIOCESE
OF PORTLAND IN OREGON,

Debtor.

TORT CLAIMANTS COMMITTEE,

Plaintiff,

v.

ROMAN CATHOLIC ARCHBISHOP OF
PORTLAND IN OREGON, AND SUCCESSORS, A
CORPORATION SOLE, dba THE ARCHDIOCESE
OF PORTLAND IN OREGON; JOHN RICKMAN,
GLENN PELIKAN and JOHNSTON MITCHELL,
individually and on behalf of all others similarly
situated; ST. ANDREWS CHURCH (PORTLAND),
as represented by its pastor, REV. CHARLES
LIENERT, ST. ANTHONY CHURCH (TIGARD), as
represented by its pastor, REV. LESLIE M. SIEG, and
ST. JUAN DIEGO CHURCH, as represented by its

Case No. 04-37154-elp11

Adv. Proc. No. 04-03292-elp

**TORT CLAIMANT
COMMITTEE'S
MEMORANDUM IN
SUPPORT OF FOURTH
MOTION FOR PARTIAL
SUMMARY JUDGMENT
(QUASI-ENDOWMENT
FUND)**

pastor, REV. JOHN KERNS, individually and on
 behalf of all parishes; COMMITTEE OF CATHOLIC
 PARISHES, PARISHIONERS AND INTERESTED
 PARTIES; CENTRAL CATHOLIC HIGH SCHOOL
 PARENTS' ASSOCIATION; CENTRAL CATHOLIC
 HIGH SCHOOL ALUMNI ASSOCIATION;
 PHOEBE JOAN O'NEILL; MARIST HIGH SCHOOL
 PARENTS AND ALUMNI SERVICE CLUB;
 FRIENDS OF REGIS HIGH SCHOOL; MARIST
 HIGH SCHOOL FOUNDATION, an Oregon non-
 profit corporation; CATHOLIC YOUTH
 ORGANIZATION/CAMP HOWARD, an Oregon
 non-profit corporation; the ST. ELIZABETH PARISH
 OF PORTLAND, OREGON, an Oregon non-profit
 corporation; MISSIONARIES OF THE HOLY
 SPIRIT, a California corporation; REGIS HIGH
 SCHOOL FOUNDATION, an Oregon non-profit
 corporation,

Defendants.

I. INTRODUCTION

This memorandum is filed in support of the Tort Claimant Committee's Fourth Motion for Partial Summary Judgment (Quasi-Endowment Fund). On July 30, 2004, Debtor filed its Statement of Affairs, and, in response to Question 14 thereof, attached Exhibit 14A entitled "Personal Property Held for Another." Exhibit 14A includes the Perpetual Endowment Fund in the amount of \$36,616,168.47. On August 12, 2004, the Court entered its Operating Order on the stipulation and motion of Debtor and the Committee. Attached to the Operating Order as Exhibit A is a list of Debtor's funds and investments that Debtor contends are held in trust. Among the accounts listed on Exhibit A is the Quasi-Endowment Fund. The Perpetual Endowment Fund and the Quasi-Endowment Fund are the same fund and will be referred to herein as the "Fund."

The Committee's Fourth Motion for Partial Summary Judgment seeks a declaration that the property of Debtor's bankruptcy estate includes the Fund because the Fund is not subject to a valid trust or, alternatively, that Debtor's bankruptcy estate includes Debtor's beneficial interest in the Fund together with Debtor's powers to amend, modify,

1 terminate and direct distribution of the Fund. There can be no dispute that Debtor was the
 2 settlor of the Fund, Debtor is the trustee of the Fund, Debtor is the beneficiary of the Fund,
 3 Debtor directs distribution of the Fund, and Debtor has the power to amend, modify and
 4 terminate the Fund. The Fund is not subject to any donor-imposed restrictions. The
 5 Committee is accordingly entitled to judgment as a matter of law.

6 **II. FACTS**

7 **A. DEBTOR IS THE SETTLOR OF THE FUND**

8 Debtor established the Fund with the proceeds from the sale of certain real
 9 property owned by Debtor. Concise Statement, ¶¶ 7, 11. Debtor has deposited additional
 10 unrestricted contributions and gifts into the Fund. Concise Statement, ¶¶ 13, 18.

11 **B. DEBTOR IS THE TRUSTEE OF THE FUND**

12 Debtor asserts that it holds the Fund in trust. Concise Statement, ¶ 3, 4.
 13 Debtor's last four Annual Financial Reports list the Fund as an unrestricted net asset of
 14 Debtor. Concise Statement, ¶ 15. Archbishop Vlazny and Leonard Vuylsteke are
 15 responsible for the fair presentation of the financial position of Debtor's Pastoral Center in
 16 the financial statements prepared by KPMG LLP. Concise Statement, ¶ 16. In two
 17 Guarantee Agreements, Debtor warranted and represented to KeyBank that its financial
 18 statements are "correct and complete in all material respects and fairly present the financial
 19 position" of Debtor. In the guarantees, Debtor covenanted to maintain a specific ratio of total
 20 Unrestricted Net Assets to Total Liabilities. Concise Statement, ¶ 17.

21 **C. DEBTOR IS THE SOLE BENEFICIARY OF THE FUND**

22 The Declaration of Trust (the "Declaration") establishing the Fund states that
 23 the primary goal of the Fund is the perpetuation of the mission of the church. Concise
 24 Statement, ¶ 7. The Declaration then lists the priorities for the use of the income of the Fund.
 25 The first priority is funding the operating expenses of the Chancery of the Archdiocese. The
 26 second priority is the support of programs of the Archdiocese. The third priority is the

1 assistance to other segments of the Church in the United States and throughout the world.
 2 Concise Statement, ¶ 8. The third priority is clarified by Archbishop Power in his
 3 memorandum to all priests dated April 7, 1981 in which he states "the third priority will be to
 4 enable the Archdiocese to meet its obligations to the national and international Church."
 5 Concise Statement, ¶ 12. The Policy promulgated by Archbishop George states that the
 6 purpose is to support the budgetary needs of the Pastoral Center. Concise Statement, ¶ 13.
 7 All uses of the Fund are subject to the normal budgetary procedures of Debtor. Concise
 8 Statement, ¶ 8.

9 **D. DEBTOR HAS THE RIGHT TO DIRECT THE DISTRIBUTION OF**
 10 **INCOME FROM THE FUND**

11 The Declaration states that all uses of the anticipated income of the Fund shall
 12 be subject to the normal budgetary procedures of the Archdiocese. Concise Statement, ¶ 8.
 13 The Fund can be terminated or dissolved. Concise Statement, ¶ 10. The October 23, 1996
 14 Policy promulgated by Archbishop George states that the Fund is discretionary. Both
 15 earnings and principal may be utilized in the support of annual operations. The Archbishop,
 16 upon recommendation of the Finance Council, can approve any disinvestment of principal.
 17 The spending limit policy can be amended by the Archbishop after consultation with the
 18 Finance Council. Concise Statement, ¶ 13. The Debtor's Annual Financial Reports classify
 19 the Fund as an Unrestricted Net Asset. Unrestricted Net Assets are defined as net assets that
 20 are not subject to donor-imposed stipulations. The Annual Financial Reports for the fiscal
 21 years ended June 30, 2001 and June 30, 2000 each state that Unrestricted Net Assets may be
 22 used at the discretion of the Pastoral Center. Investment income and other revenues are
 23 generally unrestricted by their nature. Concise Statement, ¶ 15. As previously noted,
 24 Archbishop Vlazny and Leonard Vuylsteke are responsible for the fair presentation of the
 25 financial position of Debtor's Pastoral Center in the financial statements prepared by KPMG
 26 LLP. Concise Statement, ¶ 16. Further, Debtor has warranted and represented to KeyBank

1 in two guaranties that its financial statements are "correct and complete in all material
 2 respects and fairly present the financial position" of Debtor. Concise Statement, ¶ 17. The
 3 Declaration itself states that income from the Fund can only be distributed in "such manner
 4 as the Fund managers are instructed in writing by three corporate officers of the
 5 Archdiocese." Concise Statement, ¶ 9.

6 **E. DEBTOR HAS THE RIGHT TO AMEND, MODIFY AND**
 7 **TERMINATE THE FUND**

8 The concluding paragraph of the Declaration includes the following
 9 statement:

10 However, recognizing that change is inevitable, the power to
 11 amend or modify any of the provisions of this Declaration of
 12 Trust is reserved to the office of the Archbishop of Portland in
 13 Oregon. Should this instrument be terminated or the Fund
 otherwise dissolved, all assets of the Fund shall be distributed
 to the General Treasury of the Archdiocese.

14 Concise Statement, ¶ 10. The policy promulgated by Archbishop George on October 23,
 15 1996 explicitly states that the Fund is discretionary. Both principal and earnings may be
 16 utilized in support of annual operations. Concise Statement, ¶ 13. Debtor's Annual Financial
 17 Reports state that the assets recorded in the Fund may be used at the discretion of the Pastoral
 18 Center. Concise Statement, ¶ 15. The Fund is not subject to any donor-imposed restrictions.
 19 Concise Statement, ¶¶ 13, 14, 15, 16, 17, 18.

20 **III. ANALYSIS**

21 **A. SUMMARY JUDGMENT STANDARD**

22 Summary judgment should be granted if, viewing the evidence in the light
 23 most favorable to the non-movant, there is no genuine issue as to any material fact and the
 24 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). If the moving
 25 party shows that there is no genuine issue of material fact, the burden shifts to the non-
 26 moving party to go beyond the pleadings and designate facts showing an issue for trial.

1 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The non-movant's evidence must
 2 create more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus.*
 3 *Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Summary judgment may be granted as
 4 to all or part of a plaintiff's case, as appropriate. Fed. R. Civ. P. 56(b).

5 **B. THE BANKRUPTCY ESTATE INCLUDES ALL PROPERTY**
 6 **INTERESTS OF DEBTOR**

7 Debtor's bankruptcy estate includes "all legal or equitable interests of the
 8 Debtor in property as of the commencement of the case," including all powers that the debtor
 9 may exercise for its own benefit. 11 U.S.C. § 541(a)(1); 11 U.S.C. § 541(b)(1); *Askanase v.*
 10 *Livingwell, Inc.*, 45 F.3d 103, 106 (5th Cir. 1995). Congress intended this definition to be
 11 interpreted broadly as it is vital to include all debtor's property in the estate. *U.S. v. Whiting*
 12 *Pools, Inc.*, 462 U.S. 198, 204-205, 103 S. Ct. 2309, 76 L. Ed. 2d 515 (1983). Thus, the
 13 Court must include all possible property interests and powers as part of the bankruptcy estate.

14 **C. PROPERTY OF THE ESTATE INCLUDES THE FUND**

15 **1. DEBTOR, AS THE SETTLOR OF A REVOCABLE TRUST, IS**
 16 **TREATED AS THE OWNER OF THE TRUST**

17 Congress has generally left the determination of property rights in the assets
 18 of a debtor's estate to state law. *Butner v. United States*, 440 U.S. 48, 54, 59 (1979).
 19 Whether a debtor has a legal or equitable interest in property is a question of state law. *In re*
 20 *Smith*, 189 B.R. 8 (U.S.D.C. N.D. Ill. 1995). Therefore, Oregon law determines whether
 21 Debtor retained an interest in the Fund.

22 Under Oregon law, the settlor of a revocable trust is treated as the owner of
 23 the trust. *Johnson v. The Commercial Bank*, 284 Or. 675, 588 P.2d 1096 (1978). The
 24 Oregon Supreme Court noted that the debtor "did not divest himself of the remainder
 25 interests; they were subject to complete defeasance at any time during his life if he chose to
 26 exercise his right to revoke." Therefore, the Court concluded that the debtor's interest

1 extended to the entire trust and that a creditor could reach the assets of the entire trust. *Id.* at
2 682.

3 The property of a revocable intervival's trust is ordinarily treated as though it
4 is owned by the trustor. Restatement (Third) of Trusts § 25(2). Restatement (Third) of
5 Trusts, § 25, Comment e, explains that "this result is not dependent on the trust being
6 'illusory' or 'testamentary,' or on the transfer being a fraudulent conveyance, but is based on
7 the sound public policy of basing the rights of creditors on the substance rather than the form
8 of the debtor's property rights."

9 Here, Debtor is the settlor of a revocable trust. Consequently, Debtor must be
10 treated as the owner of the trust property.

11 **2. DEBTOR CANNOT HOLD PROPERTY IN TRUST FOR** 12 **ITSELF**

13 Oregon courts have long recognized that a trust exists when "legal title is held
14 by one person, the trustee, while another person, the *cestui que* trust, has the beneficial
15 interest." *Allen v. Hendrick*, 206 P. 733, 740 (Or. 1922). There can be no trust where the
16 sole beneficial interest and the legal title are in the same person. *Morse v. Paulson*, 186 P.2d
17 394, 396 (Or. 1974); *see also Restatement (Second) of Trusts*, § 99(5) ("the sole beneficiary
18 of a trust cannot be the sole trustee of the trust."); *id.* at § 115(5) (same); *id.* at § 410 (same);
19 *Restatement (Third)* § 69 ("if the legal title to the trust property and the entire beneficial
20 interest become united in one person, the trust terminates.") Here, Debtor cannot hold
21 property "in trust" for itself.

22 **D. PROPERTY OF DEBTOR'S BANKRUPTCY ESTATE INCLUDES** 23 **DEBTOR'S BENEFICIAL INTEREST IN THE FUND AND DEBTOR'S** 24 **POWER TO AMEND, MODIFY, TERMINATE AND DIRECT** **DISTRIBUTION OF THE FUND**

25 Debtor's bankruptcy estate succeeds to "all legal or equitable interests of the
26 debtor in property as of the commencement of the case," including those powers that debtor

1 may exercise for its own benefit. 11 U.S.C. § 541(a)(1), (b)(1). Any interest which a debtor
 2 retains in a trust is property of the estate, including the power to amend the trust and the
 3 power to revoke a revocable trust and recover the remaining funds in the trust for the benefit
 4 of creditors. The Debtor's bankruptcy estate includes the powers that debtor may exercise for
 5 its own benefit over property regardless of the title debtor may be acting under. *Askanase v.*
 6 *Livingwell, Inc.*, 45 F.3d 103, 106 (5th Cir. 1995). The bankruptcy estate includes a power
 7 that the debtor may exercise for his own benefit, such as the power to revoke a self-settled
 8 trust of which he is the beneficiary. *Marrama v. Degiacomo, (In re Marrama)*, 316 B.R.
 9 418, 423 (1st Cir. B.A.P. 2004); *see also In re Porras*, 224 B.R. 367, 369 (Bankr. W.D. Tx.
 10 1998) ("thus, the bankruptcy estate, as represented by the bankruptcy trustee gains not only
 11 the property interest but may also exercise any powers which the debtor could exercise for
 12 his benefit over the property."); *In re Mack*, 269 B.R. 392 (Bankr. D. Mn. 2001).

13 Here, Debtor's beneficial interest in the Fund is property of the estate.
 14 Additionally, all of Debtor's powers over the Fund are property of the estate. Those powers
 15 include the power to amend, modify or terminate the Fund, together with the power to direct
 16 distributions from the Fund.

17 **IV. CONCLUSION**

18 For the foregoing reasons, the Committee's Fourth Motion for Partial
 19 Summary Judgment should be granted, and the Court should declare that Debtor's bankruptcy
 20 estate includes the Fund, or, alternatively, that Debtor's bankruptcy estate includes Debtor's

21 * * *

22 * * *

23 * * *

24 * * *

25 * * *

26 * * *

1 beneficial interest in the Fund, together with Debtor's powers to amend, modify terminate
2 and direct distribution of the Fund.

3 DATED this 30th day of August, 2005.

4 TONKON TORP LLP

5
6 By 
7 ALBERT N. KENNEDY, OSB No. 82142
8 Attorneys for Tort Claimants Committee

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
032545\00001\648158 V001

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **TORT CLAIMANT COMMITTEE'S MEMORANDUM IN SUPPORT OF FOURTH MOTION FOR PARTIAL SUMMARY JUDGMENT (QUASI-ENDOWMENT FUND)** on:

Pamela J. Griffith
U.S. Trustee's Office
620 S.W. Main Street, Room 213
Portland, OR 97205

Howard M. Levine
Thomas W. Stilley
William N. Stiles
Sussman Shank LLP
1000 S.W. Broadway, Suite 1400
Portland, OR 97205-3089
Attorneys for Debtor Roman Catholic
Archbishop of Portland in Oregon

James M. Finn
Schwabe, Williamson & Wyatt, P.C.
1600-1900 Pacwest Center
1211 S.W. Fifth Avenue
Portland, OR 97204-3795
Special Counsel for Debtor

L. Martin Nussbaum
Rothgerber Johnson & Lyons LLP
Wells Fargo Tower, Suite 1100
90 South Cascade Avenue
Colorado Springs, CO 80903
Special Counsel for Debtor

Brad T. Summers
Ball Janik LLP
1100 One Main Place
101 S.W. Main Street
Portland, OR 97204-3219
Attorneys for Central Catholic High
School Alumni Association, Central
Catholic High School Parents
Association, Friends of Regis High
School

Steven M. Hedberg
Douglas R. Pahl
Jeanette L. Thomas
Perkins Coie LLP
1120 NW Couch Street, 10th Floor
Portland, OR 97209-4128
Attorneys for John Rickman, Glenn
Pelikan, Johnston Mitchell,
St. Anthony Church (Tigard), St. Juan
Diego Church, Catholic Parishes.
Parishioners and Interested Parties,

Bradley S. Copeland
Loren S. Scott
Arnold Gallagher Saydack Percell
Roberts & Potter, P.C.
800 U.S. Bank Center
800 Willamette Street
P. O. Box 1758
Eugene, OR 97440-1758
Attorneys for Marist High School
Foundation, Marist High School
Parents & Alumni Service Club

David A. Foraker
Greene & Markley, P.C.
1515 S.W. Fifth Avenue, Suite 600
Portland, OR 97201-5492
Future Claimants Representative

Phoebe Joan O'Neill
1500 S.W. Fifth Avenue, Unit 703
Portland, OR 97201

Catholic Youth Organization/
Camp Howard
c/o Krista Von Borstel, Registered Agent
825 N.E. 20th Avenue, Suite 320
Portland, OR 97232

1 St. Elizabeth Parish of Portland, Oregon
2 c/o James M. Kolb, Registered Agent
3 4112 S.W. Sixth Avenue Dr.
4 Portland, OR 97201

5 Missionaries of the Holy Spirit
6 c/o Roberto Saldivar Ureno
7 Agent for Service of Process
8 9792 Oma Place
9 Garden Grove, CA 92841

10 Regis High School Foundation
11 c/o Tony Guevara, Registered Agent
12 550 Regis Street
13 Stayton, OR 97383

REQUESTS FOR NOTICE:

John L. Langslet
Scott A. Kamin
Michael J. Farrell
Martin, Bischoff, Templeton,
Langslet & Hoffman
900 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204
Attorneys for Oregon Insurance
Guaranty Association

Joseph A. Field
Field & Associates
Oregon National Building - Suite 910
610 S.W. Alder Street
Portland, OR 97205
Attorneys for ACE Property &
Casualty Company, fka CIGNA
Property & Casualty Company, fka
Aetna Insurance Company

14 ☒ mailing a copy thereof in a sealed, first-class postage prepaid envelope,
15 addressed to each party's last-known address and depositing in the U.S. mail at Portland,
16 Oregon on the date set forth below;

17 ☐ causing a copy thereof to be hand-delivered to each party at each party's
18 last-known address on the date set forth below;

19 ☐ sending a copy thereof via overnight courier in a sealed, prepaid envelope,
20 addressed to each party's last-known address on the date set forth below;

21 ☐ faxing a copy thereof to each party at such party's last-known facsimile
22 number on the date set forth below; or

23 ☐ e-mailing a copy thereof to each party at such party's last-known e-mail
24 address on the date set forth below.

25 DATED this 30th day of August, 2005.

26 TONKON TORP LLP

By 
ALBERT N. KENNEDY, OSB No. 82142
Attorneys for Tort Claimants Committee

032545\00001\648158 V001